



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/522,988	02/02/2005	William Leslie Barnes	124-1104	4650

23117 7590 09/05/2008
NIXON & VANDERHYE, PC
901 NORTH GLEBE ROAD, 11TH FLOOR
ARLINGTON, VA 22203

EXAMINER	
KALAM, ABUL	

ART UNIT	PAPER NUMBER
2814	

MAIL DATE	DELIVERY MODE
09/05/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
www.uspto.gov

028008

NIXON & VANDERHYE, PC.
901 NORTH GLEBE ROAD, 11TH FLOOR
ARLINGTON, VA 22203

In re Application of:

Barnes et al.

Serial No.: 10/522,988

Filed: February 02, 2005

Attorney Docket No.: SCS-124-1104

:
:
:
:
:

DECISION ON PETITION

This is a decision on the petition, filed July 08, 2008, requesting the examiner's holding that the inventions of elected claims 1, 2, 4, 6-11 and 15 and of withdrawn non-elected claims 3, 12, 13 and 16 do not share a common special technical feature be reviewed and reversed and all pending claims be examined. The petition is being treated as a petition under 37 C.F.R. 1.144 requesting review of the restriction requirement. The petition is before the Director of TC 2800 for review.

The petition is **DENIED**.

BACKGROUND

A final Office action was mailed on January 02, 2008. At the time this final Office action was mailed, claims 1-4 and 6-16 were pending. Claims 1, 2, 4, 6, 7, 9, 14 and 15 were finally rejected under 35 U.S.C. 102 as being anticipated by Scherer et al. (US 6,534,798), claims 3, 8 and 10 were finally rejected under 35 U.S.C. 103(a) as being unpatentable over Scherer et al. (US 6,534,798) in view of Arnold et al. (US 2004/00112328) and claim 11 was finally rejected under 35 U.S.C. 103(a) as being unpatentable over Arnold et al. (US 2004/00112328).

A notice of Appeal and a Pre-Appeal Brief Request for Review were filed on May 02, 2008.

A panel decision on the Pre-Appeal Brief Request for Review was issued on June 06, 2008, advising the appellant that the appeal would proceed.

The instant petition was filed on July 08, 2008, requesting that the examiner's action be reviewed and reversed, and all pending claims be examined.

REGULATION AND PRACTICE

37 C.F.R. § 1.144 states:

Petition from requirement for restriction.

After a final requirement for restriction, the applicant, in addition to making any reply due on the remainder of the action, may petition the Director to review the requirement.

Petition may be deferred until after final action on or allowance of claims to the invention elected, **but must be filed not later than appeal**. A petition will not be considered if reconsideration of the requirement was not requested (see § 1.181). (Emphasis added).

MPEP § 821.01 states in part:

Note that the petition under 37 CFR 1.144 must be filed not later than appeal. This is construed to mean appeal to the Board of Patent Appeals and Interferences...

OPINION

Although the petition does not indicate that it was filed under 37 C.F.R. § 1.144, a petition requesting review of an examiner's requirement for restriction falls under this section of the Rules. The instant petition requests review and reversal of the examiner's withdrawal of claims 3, 12, 13 and 16 upon finding that the inventions presented in the pending claims lack unity of invention. This petition is properly treated as a petition under 37 CFR 1.144 and must meet the requirements under this section of the Rules.

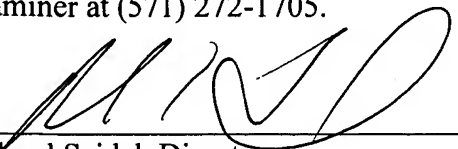
37 CFR 1.144 requires that a petition thereunder must be filed no later than the filing of an appeal to the Board of Patent Appeals and Interferences. The appeal in the instant application was filed on May 02, 2008, and the instant petition was filed on July 08, 2008, more than two months after the appeal. Accordingly, the petition was not timely and must be denied without considering the propriety of the restriction requirement.

Petitioner also raises issues with the interpretation of the claims and of the prior art. These are appealable issues that are not petitionable.

Regarding the amendment filed under 37 C.F.R. 1.116, it is noted that amendments filed after appeal are governed by 37 CFR 41.33.

Petitioner requests clarification of the status of claim 3. It is noted that claim 3 was inadvertently rejected with claims 8 and 10. Claim 3 remains withdrawn from consideration along with claims 12, 13 and 16.

Any inquiry regarding this decision should be directed Wael Fahmy Supervisory Patent Examiner at (571) 272-1705.



Richard Seidel, Director
Technology Center 2800